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Filed November 6, 1944

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 5499

JACK COLE COMPANY, INC., A CORPORATION,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of judgment in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies of Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on September 7, 1944. The petition for appeal was presented and allowed on November 6, 1944, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Southern Division of the Northern District of Alabama entered September 7, 1944. By said decree the Court ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By said suit the plaintiff had prayed the Court to restrain, enjoin and suspend the operation, execution and the effect and enforcement of an order of the Interstate Commerce Commission

(Division 5) entered Jan. 14, 1943 in the proceedings entitled number MC-73464 by the terms of which the Interstate Commerce Commission denied the application of this plaintiff for certificate of public convenience and necessity by limiting the authority granted so as not to include the transportation in interstate or foreign commerce by motor vehicle to the following described territory:

The State of Mississippi;
New Orleans and the State of Louisiana east of the Mississippi River;
Louisville, Kentucky;
Charlotte, Canton and Greensboro, N. C., and
Birmingham and a radial base of 90 miles.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petition praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument or further hearing. The said petition was denied by the Interstate Commerce Commission on Jan. 14, 1943, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time. The effective date of said order was stayed by the Interstate Commerce Commission until June 5, 1944, pending the outcome of plaintiff's petition in the District Court of the United States for the Southern Division for the Northern District of Alabama.

The principal grounds stated in the complaint in this Court are:

(a) That the Interstate Commerce Commission acted arbitrarily and capriciously in excess of its statutory power and contrary to the indisputable character of the evidence, in denying said motor carrier operating rights to the plaintiff by limiting them as above stated and (b) that the Inter-

state Commerce Commission, misapplied the law to the admitted or established facts as shown by the orders of the Commission themselves and the record in the case. Such error is predicated principally upon the following errors of the Interstate Commerce Commission:

1. The holding that where the plaintiff had been granted so-called grandfather rights in the territory involved by reason of plaintiff being in bona fide operation therein prior to the effective date of the motor carrier Act that the plaintiff had forfeited or lost these rights by reason of what the Commission styled a lack of sufficient continuity of service therein, the error consisting in the fact that as a matter of law no lack of continuity short of such inadequate service as to imply an abandonment of the operation would work such forfeiture and that the admitted and established facts in the record disclosed that there was continuity of operation sufficient as required by law and in conformity with the prior orders of the Commission:

2. That the Commission erroneously applied to the facts in this case principles of law applicable only to a proceeding to obtain a certificate of convenience and necessity where the plaintiff had not prior thereto obtained grandfather rights and thereby applied to a grandfather proceeding principles of law applicable only to proceedings other than grandfather proceedings.

3. That the record and orders of the Interstate Commerce Commission in the same proceeding and in this proceeding taken together show that the plaintiff devoted to said territory adequate continuity of service as measured and prescribed by the contemporaneous and prior orders of the Commission itself, which fact the Commission arbitrarily and capriciously ignored.

4. That the Commission found that certain stated Continuity of service was a lack of continuity of service and labeled an abandonment of service certain service expressly set forth in the orders and record which indisputably cannot be characterized as an abandonment of service.

The decision of the law court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission merely because couched in the language of the statute though contrary to, or without supporting findings of fact, based upon evidence of record, and though they manifest misapplication of the law to the facts. This is directly contrary to well recognized principles of judicial review. Accordingly it is important that this decision be reversed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States*, 314 U. S. 534.

Union Stock Yard Co. v. *United States*, 308 U. S. 213.

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282.

Florida v. *United States*, 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States*, 272 U. S. 658.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197.
McDonald v. *Thompson*, 305 U. S. 263.
United States v. *Maher*, 307 U. S. 148.

E. Decree and Opinion of the District Court

To this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

FRANCIS H. HARE,
Attorney for Plaintiff.
By FRANCIS H. HARE

APPENDIX "A"

Filed September 7, 1944

In the District Court of the United States for the Northern District of Alabama, Southern Division

Civil Action No. 5499

JACK COLE COMPANY, INC., an Alabama Corporation, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants

Findings of Fact and Conclusions of Law

The above action came on for hearing before the duly constituted statutory court, on June 2, 1944, being submitted upon the pleadings, and the record consisting of transcript of the stenographer's notes of the hearing held April 17 and 18, 1940, at Birmingham, Alabama, and Exhibit No. 10 filed at the said hearing; and Exhibit No. 16 filed at the hearing held June 24 and 25, 1940, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on August 12, 1944; and upon the briefs and arguments of counsel for plaintiff and defendants, and the Court having considered the matters presented and herein involved, does hereby enter its findings of fact and conclusions of law as follows:

Findings of Fact

1. Plaintiff is a corporation existing under the laws of the State of Alabama, with its principal place of business at Birmingham, Alabama, and is, therefore, within the venue of this court.

2. Prior to June 1, 1935, plaintiff instituted an operation as a common carrier by motor vehicle, in interstate and foreign commerce, and within the time prescribed by law,

filed application with the Interstate Commerce Commission for a certificate under provisions of Section 206(a), or in the alternative for a permit under provisions of Section 209(a) of the Motor Carrier Act of 1935 (49 U. S. C., 306 and 309), authorizing its claimed operations, in transport of general commodities, within a wide territory consisting of twenty-four states and more particularly described in the Commission reports of January 31, 1942 Exhibit 2 to Commission Answer), and January 14, 1943 (Exhibit 4 to Commission Answer). The order of January 14, 1943 (Exhibit 4a to Commission Answer) was entered after several hearings, and is the final order herein, previous orders of August 9, 1939 Exhibit 1a to Commission Answer), and of January 31, 1942 (Exhibit 2a to Commission Answer) having been set aside and vacated by the Commission for the purpose of reconsideration, after grant of petition by plaintiff therefor. The final orders of January 31, 1942, and January 14, 1943, granted plaintiff's application to the extent stated in said reports and orders, authorizing plaintiff to continue its operations as a common carrier by motor vehicle, transporting general commodities within the territory, between the points, or to or from the points named and described in said reports and orders, and otherwise denied the application.

3. Findings and conclusions of the Interstate Commerce Commission are stated in the reports and orders of August 9, 1939 (Exhibits 1 and 1a to Commission Answer), January 31, 1942 (Exhibits 2 and 2a to Commission Answer), and January 14, 1943 Exhibits 4 and 4a to Commission Answer) and said reports and orders are hereby adopted by reference and made a part of these findings.

4. The order of the Interstate Commerce Commission entered January 14, 1943, is supported by substantial evidence.

5. Findings and conclusions of the Interstate Commerce Commission, as stated in said above-referred to reports and orders, are supported by substantial evidence of record.

6. Petition of plaintiff for reconsideration of the said final order of January 14, 1943, as filed with the Interstate

Commerce Commission, was denied by it and order of June 7, 1943 (Exhibit 5 to Commission Answer), and a later similar petition for reconsideration was dismissed by order of February 7, 1944 (Exhibit 6 to Commission Answer).

7. Except as to the part reopened for reconsideration under the order of April 30, 1942 (Exhibit 3 to Commission Answer), the order of January 30, 1942, became effective prior to September 2, 1943, on which date a certificate was issued to plaintiff covering authority granted by said order of January 30, 1942, as stated in the Commission Answer. The said final order of January 14, 1943, under several extensions of the effective date thereof, is now made effective as of October 7, 1944.

Conclusions of Law

1. This Court has jurisdiction of the action herein and of the parties thereto.

2. Where there is substantial evidence of record to support its findings and conclusions, an order of the Interstate Commerce Commission will not be annulled or enjoined under court review, under provisions of the Urgent Deficiencies. Act (28 U. S. C., Secs. 41 et seq.), unless said order exceeds the statutory authority of said Commission or violates some provision of the Constitution of the United States.

3. The order of January 14, 1943, herein reviewed, is supported by substantial evidence of record.

4. The order of January 14, 1943, is within the statutory authority of the Interstate Commerce Commission.

5. The order of January 14, 1943, does not violate any constitutional rights of plaintiff.

6. The complaint herein should be dismissed for want of equity at the cost of plaintiff.

Leon McCord, United States Circuit Judge. T. A. Murphree, United States District Judge. Clarence Mullins, United States District Judge.

APPENDIX "B"

Filed September 7, 1944

In the District Court of the United States for the Northern District of Alabama, Southern Division

Civil Action No. 5499

JACK COLE COMPANY, INC., an Alabama Corporation, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants

Order of the Court

The above action came on for hearing on June 2, 1944, before the duly constituted statutory court, plaintiff and defendants being represented by counsel, and having been submitted upon the pleadings, and the record consisting of transcript of the stenographer's notes of the hearing held April 17, and 18, 1940, at Birmingham, Alabama, and Exhibit No. 10 filed at the said hearing; and Exhibit No. 16 filed at the hearing held June 24 and 25, 1940, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on August 12, 1944, and oral arguments and briefs of counsel, and having been taken under advisement by the court, and the court having considered all matters pertaining to the action herein, and having decided that the complaint herein should be dismissed at the cost of the plaintiff, and having entered its findings of fact and conclusions of law;

It is, therefore, ordered and adjudged, That the complaint herein be and the same is hereby dismissed at the cost of plaintiff.

September 7, 1944.

Leon McCord, United States Circuit Judge. T. A. Murphree, United States District Judge. Clarence Mullins, United States District Judge.